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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FLOYD TUTT,

Defendant and Appellant.

B210050

(Los Angeles County
Super. Ct. No. SA065106 c/w
SA063931)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Cynthia Rayvis, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Floyd Tutt appeals from the judgment entered upon his convictions by no contest pleas to two counts of second degree robbery (Pen. Code, § 211, counts 2 & 4).¹ Appellant admitted that he used a firearm within the meaning of section 12022.53, subdivision (b) in connection with each count. Pursuant to a plea agreement, the trial court sentenced him to an aggregate state prison term of 16 years four months. Appellant obtained a certificate of probable cause and filed this appeal in which he contends that the trial court abused its discretion in accepting his admission of the firearm allegation when there was an insufficient factual basis for the admission.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The charged robberies²

Shell gas station robbery³ (count 2)

On July 28, 2007, at approximately 4:30 a.m., Jasmine Brown (Brown) was working at a Shell gas station on West Manchester Boulevard, in Inglewood. As she was taking out the trash, a Black male, later identified as appellant, approached her, brandished a firearm and told her, ““Be calm, I’m going to rob you.”” He then ordered her inside, told her to take money from the cash register, and place it in a bag. Brown followed appellant’s orders.

¹ All further statutory references are to the Penal Code unless otherwise indicated. Ten counts of armed robbery were dismissed pursuant to the plea agreement.

² All 12 counts charged against appellant were for armed robberies. The information was amended on February 29, 2008, consolidating case Nos. SA065106 and SA063931 and changing the armed robberies that were the subjects of counts 2 and 4 in the original information in case No. SA065106. On that same date, appellant pled no contest to counts 2 and 4. While it is not absolutely clear from the record to which information appellant pled, he concedes that he pled to the amended information. Consequently, the facts set forth are to counts 2 and 4 of that information.

³ We take the facts regarding the Shell gas station robbery from the preliminary hearing transcript.

Ralphs Market robbery⁴ (count 4)

On July 28, 2007, at approximately 2:55 a.m., Mario Amemiya (Amemiya) was at work at Ralph's Market on Sepulveda Boulevard, in Los Angeles. A Black male wearing a green jacket entered the market and opened his jacket. Amemiya saw a black, steel semiautomatic handgun in his waistband. Appellant told Amemiya, "You know what I want" and walked Amemiya to a cash register. Amemiya gave him the money in the register. Appellant then demanded alcohol. Amemiya walked him to the liquor section where appellant took three bottles of liquor and left.

The charges and plea

Arising from these incidents, and numerous other similar robberies, appellant was charged in two consolidated matters with 12 counts of armed robbery. He accepted the prosecution's plea offer and agreed to plead guilty or no contest to counts 2 and 4 and to admit the firearm enhancement in section 12022.53, subdivision (b) as to each, in return for a 16-year four-month sentence.

Before giving his plea, appellant signed a written "Felony Advisement of Rights, Waiver, and Plea Form." He checked the boxes that stated: "14. Prior to entering this plea, I have had a full opportunity to discuss with my attorney the facts of my case, the elements of the charged offense(s) and enhancement(s), any defenses that I may have, my constitutional rights and waiver of those rights , and the consequences of my plea. . . . 16. I offer to the Court the following as the basis for my plea of guilty or no contest and any admission(s) . . . A. I stipulate and agree that there is a factual basis for my plea(s) and admission(s)." At the end of the form, appellant signed it where it stated that he read each of the paragraphs, discussed them with his attorney and understood them. Similarly, his attorney signed the form stating that the attorney had reviewed it with his client, explained the client's rights to the client, and stipulated that there was a factual basis for the plea.

⁴ We take the facts regarding the Ralph's Market robbery from the police report.

After signing the plea form and being advised of his constitutional rights, appellant waived them in open court. He then pled no contest to the two robbery counts and admitted the firearm allegation. His counsel joined in the waivers and stipulated with the prosecutor to a factual basis for the plea “based on the police reports.” The trial court found that appellant voluntarily waived his constitutional rights and that there was a factual basis for the plea.

DISCUSSION

Contention

Appellant’s sole contention is that the trial court abused its discretion and failed to comply with section 1192.5 in accepting his admissions of the firearm use allegation in section 12022.53, subdivision (b) in connection with counts 2 and 4, when there was an insufficient factual basis for the admissions. This contention lacks merit.

The negotiated pleas

Section 1192.5 provides that, if the court approves a negotiated plea, it must inform the defendant of certain conditions that must be met before the plea is taken, and further provides that “[t]he court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that *there is a factual basis for the plea.*” (Italics added; see also *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181 [§ 1192.5 only applies to negotiated pleas].) Section 1192.5 protects “against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged.” (*People v. Watts* (1977) 67 Cal.App.3d 173, 178; *People v. French* (2008) 43 Cal.4th 36, 50.)

The agreement between the People and appellant, approved by the trial court, that appellant would plead to two of the 12 armed robbery charges and admit the firearm allegation in exchange for a sentence of 16 years four months is a negotiated plea contemplated by section 1192.5. (See *People v. Orin* (1975) 13 Cal.3d 937, 942.)

Standard of review

The trial court has broad discretion in determining whether a sufficient factual basis exists for a guilty or no contest plea. (*People v. Holmes* (2004) 32 Cal.4th 432, 442-443 (*Holmes*).) We review the trial court's determination for abuse of discretion. (*Ibid.*)

Adequate factual basis

Section 1192.5 requires that the trial court inquire of the defendant or of defense counsel to satisfy itself that a factual basis exists for the plea. (*Holmes, supra*, 32 Cal.4th at p. 436.) In our Supreme Court's most recent pronouncement on the subject in *Holmes*, it concluded that the proper section 1192.5 standard requires the trial court to "garner information regarding the factual basis either from the defendant or defense counsel. If the trial court examines the defendant regarding the factual basis for the plea, the court may have the defendant describe the conduct that gave rise to the charge [citation], or may question the defendant regarding the detailed factual basis described in the complaint or written plea agreement. [Citation.] If the trial court inquires of defense counsel regarding the factual basis, *counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.]*" (*Holmes, supra*, at p. 442, italics added.) An admission of an enhancement is "subject to the same principles as guilty pleas." (*People v. Westbrook* (1996) 43 Cal.App.4th 220, 223-224.)

In the matter before us, the parties stipulated to the factual basis for the plea and admission of the enhancements based upon the "police reports."⁵ With no further comment or specification of the facts it was relying upon, the trial court conclusorily stated that it found there to be a factual basis for the plea. This procedure comported with

⁵ The record before us contains only the police report relating to the Ralph's Market robbery, not the police report regarding the Shell gas station robbery.

the above-quoted directions of *Holmes* in how the trial court should make the factual basis determination.

The police report regarding the Ralph's Market robbery, contained in the appellate record, states that the victim saw a black, steel semiautomatic handgun in appellant's waistband. This testimony establishes a prima facie factual basis to support the firearm allegation. (*Holmes, supra*, 32 Cal.4th at p. 441 ["The factual basis required by section 1192.5 does not require more than establishing a prima facie factual basis for the charges"].) "[J]urors 'may draw an inference from the circumstances surrounding the robbery that the gun was not a toy.'" (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1437.) Criminals "'do not usually arm themselves with unloaded guns when they go out to commit robberies.'" (*Ibid.*) The jury is entitled to take a defendant at his word, so to speak, and infer from his conduct that the handgun was a real, loaded firearm. (*Ibid.*)

Appellant has failed to provide the police report upon which the stipulation to a factual basis for the Shell gas station robbery was premised. "[W]e can know what occurred in the trial court only if we are furnished with an adequate record of the proceedings there." (*Mesaris v. Superior Court* (1970) 4 Cal.App.3d 976, 978.) "[A]ppellate counsel must provide an adequate appellate record." (*People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Barton* (1978) 21 Cal.3d 513, 519-520 ["counsel has a duty to insure that there is an adequate record before the appellate court from which those contentions may be resolved on their merits. Where the appropriate record is missing or incomplete, counsel must see that the defect is remedied . . ."].) Appellant's failure to provide the Ralph's Market robbery police report, on which the factual basis for the firearm enhancement for that charge was based, justifies our denial of his contention for this reason alone.

However, the transcript of the preliminary hearing regarding the Shell gas station robbery, conducted on January 10, 2008, is contained in the record before us. Officer Daniel Diaz testified that he responded to the scene of the robbery, spoke with Brown and authored the report regarding the incident to which counsel stipulated as the factual basis for appellant's plea. During his testimony, Officer Diaz refreshed his recollection by

looking at his report. We can reasonably deduce that his testimony was substantially the same as his report. He testified that Brown told him that appellant “brandished a firearm” which he pulled out of his pocket. This statement provided a prima facie case in support of the firearm enhancement.⁶

Consequently, there was a factual basis for appellant’s admission of the firearm enhancement in connection with counts 2 and 4. Appellant argues, however, there was evidence that he used only an air gun, which does not support the firearm enhancement. Like a guilty plea, a defendant cannot appeal from his firearm allegation based upon the insufficiency of the evidence. (See *People v. Wallace* (2004) 33 Cal.4th 738, 750.) Appellant’s claim that he used only an air gun is an attempt to challenge the sufficiency of the evidence and is not cognizable on appeal.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ

⁶ Appellant argues that “the police report was not made a part of the trial court record and therefore cannot be made a part of the record on appeal. As a result, the trial court could not satisfy itself that there was a sufficient factual basis for appellant’s admissions to the gun allegations.” This argument is fallacious. The record indicates that the factual basis stipulation was premised upon the “police reports.” There is no indication that the trial court did not review and consider those reports in rendering its finding that there was a factual basis for the pleas. We presume that the trial court’s order was correct and will not be overturned unless the record affirmatively shows that it erred. (*People v. McCune* (1995) 37 Cal.App.4th 686, 690.)